Filed 5/25/12 Marriage of Wilson and Thornhill CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of GARY L. WILSON and BARBERA H. THORNHILL. GARY L. WILSON, Respondent, v. BARBERA H. THORNHILL, Appellant.	B232329 (Los Angeles County Super. Ct. No. BD488238)

APPEAL from an order of the Superior Court of Los Angeles County, Hank M. Goldberg, Judge. Affirmed.

Edward J. Horowitz; Young & Spiegel, Lance S. Spiegel; Barbakow & Ribet, Claudia Ribet; Glaser Weil Fink Jacobs Howard Avchen & Shapiro and Patricia L. Glaser for Appellant.

Rick Edwards for Respondent.

In this divorce proceeding, appellant wife moved to bifurcate and set for early trial the issue of the validity of a purported agreement with respondent husband to transmute several pieces of real property from personal property to community property.[1] (Cal. Rules of Court, rule 5.175.) Following a trial of the bifurcated issue, the family law court concluded that appellant had failed to meet her burden to: (1) establish the purported agreement's compliance with the threshold requirements of Family Code section 852;[2] and (2) rebut the presumption of undue influence that exists where, as in this case, an interspousal transaction advantages one spouse (appellant).

After the trial court certified the order for immediate appeal, we granted appellant's motion to file an interlocutory appeal. (Cal. Rules of Court, rule 5.180.) In light of our determination that appellant has failed to establish the existence of reversible error, we affirm.

BACKGROUND

Appellant Barbera H. Thornhill (Barbera) and respondent Gary L. Wilson (Gary) were married on October 30, 1992.[3] On June 25, 2008, Gary petitioned for legal

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1 The general rule is that "[t]he status of property as community or separate is normally determined at the time of its acquisition." (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 591.)

Separate property includes "[a]ll property owned by the person *before* marriage." (Fam. Code, § 770, subd. (a)(1), italics added.)

Community property, except as otherwise provided by statute, includes "all property, real or personal, wherever situated, acquired by a married person *during* the marriage while domiciled in this state." (Fam. Code, § 760, italics added.)

2 Unless otherwise indicated, all further statutory references are to the Family Code.

3 We refer to the parties by their first names for the sake of convenience and intend no disrespect.

separation. On November 19, 2008, Barbera filed a response and request for dissolution of marriage.

On July 31, 2009, Barbera moved for a bifurcated and early trial on the validity of the September 1999 agreement through which the couple purportedly transmuted several valuable pieces of real property from personal to community property. Over Gary's objection, the trial court granted Barbera's motion and tried the bifurcated issue over several days between July and December 2010. On December 29, 2010, the trial court provided a detailed 25-page tentative statement of decision, which became the final statement of decision (order), in which it found against Barbera on all essential issues.

In the following sections, we focus on the trial court's order and the relevant facts and law pertaining to its determination that Barbera failed to establish the existence of a valid transmutation agreement.

I. The Real Properties at Issue

Barbera argued at trial that the following real properties were transmuted from separate property to community property by the September 1999 agreement:

A. The Malibu Property

Gary purchased the Malibu property with his separate property funds before he married Barbera. Gary holds title to the Malibu property as his separate property.

B. The Delfern Property

The Delfern property consists of two adjacent parcels, 300 Delfern and 320 Delfern, which were purchased at different times. Gary purchased 300 Delfern with his separate property funds before he married Barbera, and he later purchased 320 Delfern with his separate property funds during the marriage. The record indicates that title to both properties is held by a trust or trusts in which Barbera apparently claims no interest.

C. The New York Property

After Barbera and Gary were married, a New York "condominium on Park Avenue" was purchased with Gary's separate property funds. It is undisputed that title to the New York property "is in Barbera's name."

II. Two Main Requirements for Establishing the Existence of a Valid Transmutation Agreement

In order to establish the existence of a valid transmutation agreement between spouses, Barbera faced two main requirements. First, she had to show that the September 1999 agreement complied with the threshold requirements of section 852. Next, she had to rebut the presumption of undue influence that applies where, as here, an interspousal transaction advantages one spouse.

A. Section 852—the Threshold Requirement

Section 852, subdivision (a) provides: "A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected."

In order to comply with section 852, there must be an express written declaration that unambiguously states "that a change in the characterization or ownership of the property is being made. (*Estate of MacDonald* [(1990)] 51 Cal.3d 262, 272.) '[A] writing signed by the adversely affected spouse is not an "express declaration" for the purposes of [Civil Code] section 5110.730(a) [now Fam. Code, § 852, subd. (a)] *unless* it contains language which expressly states that the characterization or ownership of the property is being changed.' (*Ibid.*) [¶] . . . The express declaration must unambiguously indicate a change in character or ownership of property. (*In re Marriage of Koester* (1999) 73 Cal.App.4th 1032, 1037, fn. 5.) A party does not 'slip into a transmutation by accident.' (*Ibid.*)" (*In re Marriage of Starkman* (2005) 129 Cal.App.4th 659, 664.)

The legislative purpose of section 852's express writing requirement was to change the former rule that "permitted the oral transmutation of property between spouses notwithstanding the statute of frauds." (*In re Marriage of Campbell* (1999) 74 Cal.App.4th 1058, 1062.) The former rule "generated extensive litigation in dissolution proceedings" and encouraged "spouses to transform a passing comment into an agreement, or to commit perjury by manufacturing an oral or implied transmutation. [Citation.]"[4] (*Id.* at p. 1063; see Manolakas, *The Presumption of Undue Influence Resurrected: He Said/She Said Is Back* (2006) 37 McGeorge L.Rev. 33, 34 (*The Presumption of Undue Influence*).)[5]

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[4] "Transmutations of property made before January 1, 1985, are still governed by the law that existed before that date. (See Fam. Code, § 852, subd. (e).) Under the former law, a transmutation could be made by written or oral agreement. No particular formalities were required for an effective transmutation except that the agreement be fair and based on full disclosure of relevant facts. (*Estate of Wilson* (1976) 64 Cal.App.3d 786, 798.) The mutual consent of the spouses constituted sufficient consideration to support the transmutation. (*Ibid.*)" (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293, fn. 8 (*Haines*).)

[5] "In determining the character of property upon the dissolution of a marriage, a complex structure of presumptions apply, beginning with the general community property presumption. With regard to titled property, the general community property presumption is overcome by the general title presumption that, in turn, is overcome by various statutory presumptions. This hierarchy of presumptions in the classification of property is necessary in order to enforce and protect the expectations of the parties and carry out state public policy. The character of property may also be changed by spousal agreement with post-1984 transmutations valid only if memorialized by an express written declaration. The California Legislature imposed a writing requirement in order to curb the litigation and false testimony generated by the prior law that allowed for oral transmutations." (*The Presumption of Undue Influence*, *supra*, 37 McGeorge L.Rev. at p. 34.)

B. The Second Hurdle—Overcoming the Presumption of Undue Influence

In addition to meeting the threshold requirements of section 852, a transmutation agreement between spouses must also comply with the rules governing fiduciary relationships. (*Haines, supra*, 33 Cal.App.4th at pp. 293-294.)

"Although spouses may enter transactions with each other (Fam. Code, § 721, subd. (a)), such transactions 'are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of' unmarried business partners, including the right of access to records and information concerning their transactions. (Fam. Code, § 721, subd. (b).)" (*In re Marriage of Starr* (2010) 189 Cal.App.4th 277, 281, fn. omitted (*Starr*).)

"'When an interspousal transaction advantages one spouse, "[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence." [Citation.] "Courts of equity . . . view gifts and contracts which are made or take place between parties occupying confidential relations with a jealous eye." [Citation.]' (*Ibid.*) Thus, the requirements of section 852 are prerequisites to a valid transmutation but do not necessarily in and of themselves determine whether a valid transmutation has occurred." (*In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 588.)

"When a presumption of undue influence applies to a transaction, the spouse who was advantaged by the transaction must establish that the disadvantaged spouse's action 'was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of' the transaction." (*In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 738-739.) "The question 'whether the spouse gaining an advantage has overcome the presumption of undue influence is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence.'" (*Id.* at p. 737.) "A spouse who gained an advantage from a transaction with

the other spouse can overcome that presumption by a preponderance of the evidence. [Citation.]" (*Starr*, *supra*, 189 Cal.App.4th at p. 281.)

In this case, Barbera conceded that the presumption of undue influence applies because the September 1999 agreement, if upheld, would clearly place Gary at a great financial disadvantage. The parties agreed that the New York property (Barbera's separate property), which was purchased for about $1 million with Gary's separate property funds, was worth less than 10 percent of the Malibu and Delfern properties (Gary's separate properties), and that the "Delfern and Malibu are [worth] more than 90 percent of the total pot."

III. Barbera Admitted She Was Incapable of Proving, Without Resorting to Extrinsic Evidence, the September 1999 Agreement's Compliance With Section 852's Threshold Requirements

"In deciding whether a transmutation has occurred, we interpret the written instruments independently, without resort to extrinsic evidence. (*Estate of MacDonald*, *supra*, 51 Cal.3d 262, 271-272; *In re Marriage of Barneson*, *supra*, 69 Cal.App.4th 583, 588 [interpretation of written documents subject to independent review].)" (*In re Marriage of Starkman*, *supra*, 129 Cal.App.4th at p. 664.)

On its face, the September 1999 agreement, which was stamped "DRAFT," did not contain an express declaration that the subject properties were being transmuted from separate to community property. Among the September 1999 agreement's many defects in terms of section 852's requirements were that although the property descriptions were to be set forth in exhibits A and B to the agreement, exhibits A and B were never signed or dated by the parties and had several blank spaces for the property descriptions.

In light of these and other deficiencies, the trial court held that the September 1999 agreement did not meet the express declaration requirement of section 852 because it was

not clear and unambiguous.[6] The trial court pointed out that Barbera's reliance on extrinsic evidence to fill in the missing property descriptions, signatures, and the like

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[6] In its order, the trial court provided an extensive and detailed explanation as to the numerous reasons why the September 1999 agreement was not clear and unambiguous. We set forth below a few of those reasons with quotations from the trial court's order.

First, by signing an agreement stamped "DRAFT," the parties may have intended to create an enforceable contract or they may have intended to continue negotiating a future agreement. Either interpretation is reasonable: "It is hornbook law that evidence of preliminary negotiations or an agreement to enter into a binding contract in the future does not alone constitute a contract. [Citation.] So the question is which do we have here—an agreement to agree in the future or a binding agreement? Based on the face of the document, both interpretations are reasonable. The ambiguity is fatal."

Second, the evidence was insufficient to establish that Barbera and Gary had seen exhibits A and B, which they did not sign, before they signed the agreement. At trial, neither spouse could recall seeing exhibits A and B when the agreement was signed. Even assuming that exhibits A and B were part of the agreement, the incomplete or missing property descriptions created an ambiguity as to whether the parties intended to create a binding transmutation agreement or a nonbinding agreement to agree in the future. Given this ambiguity, there were four possible reasonable inferences: (1) the agreement is ambiguous; (2) the court may need to consider extrinsic evidence to determine which properties were being transmuted, which section 852 does not allow (*Estate of MacDonald*, *supra*, 51 Cal.3d at pp. 271-272 [whether the writing meets the requirements of section 852 must be made by reference to the writing itself, without resorting to parol evidence]); (3) the parties did not treat the agreement as if they believed it to be a legally binding document; and (4) the parties may not have seen exhibits A and B until some later time.

Third, by failing to have a notary sign and complete the blanks in the agreement's notary block, the parties created an ambiguity as to their intention to create a binding agreement. "If the agreement had been notarized, this would strongly point to an understanding that it was currently binding—why would the parties notarize a non-binding draft? The reverse is also true—lack of notarization tends to point to a belief that the document was a draft. The court believes that this defect, standing alone, is not fatal but contributes to the court's finding in the light of the other evidence."

Fourth, by signing the agreement without filling in the blank for the date, the parties created an ambiguity as to their intention to create a binding agreement. "Why not date the documents? There would be no reason to date them if one believed that final clean documents would then be prepared and executed. This lack of a date, standing alone, is not fatal but contributes to the court's finding that the agreement was a draft and that the parties did not treat it as binding in the light of the other evidence."

(Fn. continued.)

constituted a "concession that the document is ambiguous—a fatal defect under Family Code, section 852. Further, wife argues that 'because the agreement in this case is susceptible to more than one reasonable interpretation, the Court must consider extrinsic evidence. . . .' [Internal record reference omitted.] Again, such an agreement can not survive section 852. (Here, the court is in no way commenting on the trial tactics and understands that wife's approach was necessary from a tactical viewpoint.)"

IV. Based on the Parties' Testimony and Credibility, the Trial Court Found that Neither Spouse Intended to Enter Into a Binding Transmutation Agreement When the September 1999 Agreement Was Signed

After examining the September 1999 agreement and finding it to be ambiguous on its face, the trial court considered the extrinsic evidence as to the parties' intent upon signing the agreement. Without delving into the trial court's lengthy and detailed explanation of its credibility findings, which ultimately favored Gary, we quote the order's summation with regard to the third element of section 852—that the agreement was joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected—in which the trial court found that neither party believed that the agreement was binding:

"This third element was not met. Ordinarily, signing the agreement would be evidence of acceptance. (See *In re Marriage of Benson* [(2005)] 36 Cal.4th 1096, 1105.) Both parties signed the agreement. Both joined in the document, the first page of exhibit A [referring to the September 1999 agreement itself]. The question is what did they intend to join in? The court concludes that husband intended to join in an agreement

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Fifth, the agreement is ambiguous because the average reasonable person would not have understood the purported waiver of the right of reimbursement under section 2640. The court stated, "Although family law lawyers and judges know what '2640' refers to[,] an average person, even a non family law lawyer, would have no idea." "[T]hat the parties would sign a document purporting to waive a significant multimillion dollar right without knowing what they were doing, tends to show that the parties did not consider the transmutation to be binding."

to possibly enter into a future transmutation agreement. Considering the document itself and also the extrinsic evidence, the court concludes that the wife did not believe that the agreement was a binding transmutation at any time on September 24, 1999 or thereafter."

V. Barbera Failed to Rebut the Presumption of Undue Influence

Given that Barbera was faced with two requirements—proving that the agreement complied with section 852 *and* rebutting the presumption of undue influence—she necessarily litigated the issue of undue influence at trial. In her closing argument, for example, her attorney stated that "the three elements of overcoming the burden of the presumption of undue influence [are]: language comprehension, education and experience in similar transaction, representation by counsel, and acknowledgement in the writing itself. Gary Wilson's sophistication, education, and experience [are] unparalleled. You will never have a more sophisticated party in your courtroom than Mr. Wilson from the standpoint of business experience and acumen: . . . Duke BA, Wharton MBA, the Chairman of the Board of Northwest Airlines, CFO of Disney Company, CFO of Marriott Corporation, member of the Board of the Keck . . . School of Medicine." Counsel further argued that Gary voluntarily signed the September 1999 agreement after "waiting ten months and weighing the pros and the cons . . . . [H]e just decided I'm going to commit. I'm going to sign. That's what he did."

In response, Gary's attorney argued that Barbera had failed to rebut the presumption of undue influence. Counsel cited Gary's testimony (which was later found to be credible) that he was ignorant of his reimbursement rights under section 2640, which were never explained to him even though tens of millions of dollars were at stake as a result of the agreement's purported waiver. Counsel asserted that even "if Barbera were to somehow survive the ambiguity issue and the extrinsic evidence issue, her case would still fall at the undue influence presumption; and there is one primary reason for that in my opinion. And that primary reason is Mr. Wilson's ignorance of 2640."

For purposes of this appeal, the main significance of section 2640 is that it was *not explained* to either spouse before the agreement was signed.[7] In its section 852 analysis,

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[7] Section 2640 addresses a spouse's right to reimbursement of separate property "contributions to the acquisition of property" of the community property estate and the other spouse's separate property estate during the marriage. The statute provides:

"(a) 'Contributions to the acquisition of property,' as used in this section, include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.

"(b) In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division.

"(c) A party shall be reimbursed for the party's separate property contributions to the acquisition of property of the other spouse's separate property estate during the marriage, unless there has been a transmutation in writing pursuant to Chapter 5 (commencing with Section 850) of Part 2 of Division 4, or a written waiver of the right to reimbursement. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division."

According to the Law Revision Commission Comment to section 2640, the statute was enacted in 1983 to reverse the "rule of *In re Marriage of Lucas*, 27 Cal.3d 808, 614 P.2d 285, 166 Cal.Rptr. 853 (1980), and cases following it, which precluded recognition of the separate property contribution of one of the parties to the acquisition of community property, unless the party could show an agreement between the spouses to the effect that the contribution was not intended to be a gift. Under Section 2640, in case of dissolution of the marriage, a party making a separate property contribution to the acquisition of the property is not presumed to have made a gift, unless it is shown that the parties agreed in writing that it was a gift, but is entitled to reimbursement for the separate property contribution at dissolution of marriage. The separate property contribution is measured by the value of the contribution at the time the contribution is made. Under this rule, if the property has since appreciated in value, the community is entitled to the appreciation. If the property has since depreciated in value, reimbursement may not exceed the value of the property; if both parties are entitled to reimbursement and the property has insufficient value to permit full reimbursement of both, reimbursement should be on a

(Fn. continued.)

the trial court found that the agreement was ambiguous for numerous reasons, including the fact that the purported waiver of section 2640 reimbursement rights "would not have been understood by the average reasonable person." The court's order stated in relevant part: "Although family law lawyers and judges know what '2640' refers to[,] an average person, even a non family law lawyer, would have no idea. The court believes that neither party knew what this term meant. The conflicts letter, exhibit B, did not clearly explain this concept. Also, the letter would be extrinsic evidence, as previously noted. There was no evidence that 2640 was ever orally explained. The attorney who prepared the document, Mr. Frimmer, did not explain 2640 to the parties. Husband did testify that if valid, the agreement would convert the ownership of Delfern to '50/50.' This testimony could refer to the ownership of the equity, which in husband's mind may or may not include a separate property down-payment and/or remodeling expenses. Nothing in his testimony convinces the court that he understood and intended to waive his right to 2640 reimbursements. The court believes husband's testimony that he did not understand the concept. Even if the transmutation were valid, the court might have to find that this provision would not be valid in that it was not 'joined in, consented to, or accepted' within the meaning of Family Code section 852. Further, that the parties would sign a document purporting to waive a significant multimillion dollar right without knowing what they were doing, tends to show that the parties did not consider the transmutation to be binding."

Similarly, the court found under a subjective standard that because Gary did not understand his significant property rights under section 2640, the presumption of undue influence was unrebutted. Even though the trial court found there was sufficient evidence that Gary had freely and voluntarily[8] signed the September 1999 agreement with a

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proportionate basis." (Cal. Law Revision Com. com., 29D West's Ann. Fam. Code (2004 ed.) foll. § 2640, p. 590.)

[8] The court found that there was no evidence that respondent's free will was overborne. On the contrary, respondent "testified that he seriously weighed the 'pros and (Fn. continued.)

rational hope of achieving a stronger and more stable domestic relationship with Barbera,[9] the evidence failed to show that Gary possessed the requisite knowledge of the facts and understanding of the transfer to overcome the presumption of undue influence.

The trial court fully acknowledged that although Gary testified to several earlier acts of violence and threats by Barbera, he did not sign the agreement under duress. The court also realized that Gary had willingly signed the agreement in the hope of creating a better home environment. According to the order, "There was no specific threat that was 'final straw' in signing exhibit. He testified it was an accumulation of behavior over a couple of years. The 'environment' was a factor in signing the agreement. He felt the environment was a toxic environment with Barbera being violent throughout the summer

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cons' for and against signing the agreement before signing it. [Internal record citation omitted.] The court gives a great deal of weight to this testimony."

[9] According to the trial court's order, "wife hit him and shoved him during an incident before their son was born, before May 1998[, but he] did not recall if hitting or striking involved a discussion or argument related to the Delfern estate. The last time there was any incident of violence was within [the] last three or four years, some time after 2006. Husband remembered four specific acts of violence during the marriage. Before September 24, 1999, there was an incident in master bedroom in which wife became angry and became violent. Husband did not recall precisely when it happened, but it was before [their son] Gary Hale was born. Wife entered into master bedroom and got angry and pushed and slapped me and pushed me down.

"There were also incidents involving throwing objects at him before the alleged transmutation. He also testified to threats, some of which happened before the signing of the alleged transmutation. He did not recall any of the threats specifically before [he] signed the alleged transmutation. He testified that the implications of the threats were that wife would destroy his reputation and create a public relations problem related to his airline, but he did not recall what she said. She did not threaten him with physical violence. . . .

"Husband also testified that by September of 1999, the parties had a one year old child, Gary Hale. Before signing the alleged transmutation agreement, husband's view was that wife neglected son and entrusted care of son to nannies of questionable background. One of [the] issues he hoped would be corrected by transmuting the property was that she would become a better mother. He thought it might be positive to transmute Delfern to maybe facilitate peace in [the] household. He testified he thought it would possibly benefit his son."

and being disturbed. He wanted to have peace, and believed signing the agreement would possibly achieve this."[10]

Notwithstanding its factual finding that Gary had signed the agreement voluntarily and without duress, the trial court found that Gary's knowledge and understanding of the facts and the effect of the transfer were *insufficient* to overcome the presumption of undue influence. The order stated that "husband was fully advised as to the purpose of a transmutation in the attorney letter, exhibit B, *except as to the Family Code*[] *section 2640 issue*. [¶] Although the court concludes that the agreement was made freely and voluntarily, the issue remains whether it was made with full knowledge of all the facts, and with a complete understanding of the effect of a transfer. [Citation.] For the same reasons the court explained under its 852 analysis, the court concludes that it was not. In short, husband testified that the alleged transmutation was a 'term sheet'—an agreement to agree in the future. When he signed that agreement, he did not believe it was binding." (Italics added.)

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10 The trial court distinguished this case from *Haines*, *supra*, 33 Cal.App.4th 625, stating: "Conspicuously absent from this trial is a claim by husband that he signed the document involuntarily, or that he felt he had no choice. As previously noted, he did not recall signing the agreement or the surrounding circumstances. On the contrary, he weighed the pros and cons of signing the agreement. This case is clearly distinguishable from *In re Marriage of Haines*[, *supra*,] 33 Cal.App.4th 624. There, wife quitclaimed her interest in the house to husband. The parties had several arguments about signing the deed as their marriage deteriorated. She claimed that husband ranted and raved, as in our case, and that he pulled her hair and threw water in her face. However, in *Haines*, unlike our case, husband agreed to co-sign a loan for wife to purchase a car that she needed once she was on her own. While husband drove her to the credit union to co-sign the loan, he told her he would not do so unless she agreed to the quitclaim deed. She signed the deed because she felt she had no alternative. By contrast, in our case there was no direct linkage between a specific threat or conduct, such as not co-signing the car loan, and the signing of the agreement. In our case, there was no testimony that husband felt he had no alternative. The desire to sign the agreement to achieve a stronger and more stable domestic relationship and achieve tranquility, standing alone, is a legitimate and rational reason to enter into such an agreement and supports rather than detracts from a finding of voluntariness."

In light of its adverse determinations as to both issues—the failure to comply with section 852 and the failure to rebut the presumption of undue influence—the trial court ruled that a valid transmutation agreement had not been proven.

DISCUSSION

In the appellant's opening brief (AOB), Barbera focuses almost exclusively on the trial court's section 852 analysis and all but ignores the adverse factual finding that the presumption of undue influence was unrebutted. The AOB's sole reference to the adverse finding on the presumption of undue influence is located in the section titled "Procedural Background," and consists of the following three paragraphs:

"As to whether the presumption of undue influence had been rebutted (undue influence being a defense to an otherwise valid transmutation), the trial court's heading at 2 [Clerk's Transcript] 258, to the effect that the presumption was not rebutted, makes no sense. The following discussion follows the trial court's heading: The Transmutation Agreement 'was made freely and voluntarily'[;] it 'was not executed under duress'[;] it was entered voluntarily; and 'husband was fully advised as to the purpose of a transmutation in the attorney letter, exhibit B, except as to the Family Code section 2640 issue.' [Internal record reference omitted.]

"These factual findings can lead only to the legal conclusion of ***no*** undue influence. ([*Starr, supra*,] 189 Cal.App.4th 277, 284 ['Undue influence is a contract defense based on the notion of coercive persuasion. Its hallmark is high pressure that works on mental, moral, or emotional weakness, and it is sometimes referred to as overpersuasion.'].)

"Therefore, the finding that there was undue influence shown in this case because Gary testified that the Transmutation Agreement was 'a term sheet' [internal record reference omitted], betrays circular reasoning; *i.e.*, the conclusion stems from the court's belief that the document was 'an agreement to agree.' But that conclusion has nothing to do with undue influence."

Even if we were to construe the above remarks as sufficient to raise an issue on appeal concerning undue influence, the AOB is silent with regard to the sufficiency of the evidence to support the factual finding that Gary signed the agreement without the requisite knowledge of the facts and understanding of the effect of the transfer. (See *In re Marriage of Burkle, supra,* 139 Cal.App.4th at pp. 738-739.) As we have no obligation to address arguments that are not raised in the opening brief, we will not consider this unbriefed issue. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [contentions raised for the first time in a reply brief will ordinarily not be considered and may be deemed forfeited].)

Moreover, it is not enough for an appellant to simply argue there was insufficient evidence without providing relevant transcript references and supporting arguments. The rule is well established that, """It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings. The reviewing court is not called upon to make an independent search of the record where this rule is ignored. [Citation.]" [Citation.] "A claim of insufficiency of the evidence to justify findings, consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration, when it is apparent, as it is here, that a substantial amount of evidence was received on behalf of the respondents. Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner."""" (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 283.)

Barbera's failure to challenge the sufficiency of the evidence to support the adverse factual finding that, in light of Gary's lack of knowledge and understanding as to section 2640, the presumption of undue influence was unrebutted, is dispositive of her appeal. Even if we assume, for the sake of argument, that the trial court's section 852 analysis is incorrect, Barbera has not explained why the error would be prejudicial given the unrebutted presumption of undue influence. We therefore resolve this appeal based

on the fundamental rule that "'[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. . . .' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

DISPOSITION

The order is affirmed. Respondent is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.